

WHY THE SUPREME COURT WILL NOT TAKE PRETRIAL RIGHT TO COUNSEL SERIOUSLY

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Implicit in the title of this paper is the assumption that the Supreme Court does not take the pretrial right to counsel seriously. After establishing that, I will attempt to ascertain why.

I. WHEN DOES THE RIGHT TO COUNSEL ATTACH?

I have argued elsewhere that normatively the right to counsel should attach upon arrest.¹ That was briefly the law after *Escobedo v. Illinois*.² However, *Miranda*, for good or ill, found the right to pretrial counsel housed in the Fifth Amendment.³ I frankly do not believe that the *Miranda* Court believed that its holding would create a dichotomous superstructure between the Sixth Amendment right to counsel and the Fifth Amendment right to counsel. But, that is exactly what happened.

In cases involving only the Fifth Amendment, the Court became concerned only with voluntariness, not wisdom. Thus, an unwise waiver of the right to remain silent and the right to counsel was considered a good thing, or at least not a bad thing.⁴ For example, in *Colorado v. Spring*, the Court opined, “We have held that a valid waiver does not require that an individual be informed of all information ‘useful’ in making his decision or all information that ‘might . . . affec[t] his decision to confess.’”⁵ The Court further stated,

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1. See Arnold H. Loewy, *The Supreme Court, Confessions, and Judicial Schizophrenia*, 44 SAN DIEGO L. REV. 427, 435 (2007).

2. See *Escobedo v. Illinois*, 378 U.S. 478, 492 (1964).

3. See *Miranda v. Arizona*, 384 U.S. 436, 469 (1966).

4. See *Colorado v. Spring*, 479 U.S. 564, 573-74 (1987) (holding that the defendant voluntarily waived his Fifth Amendment right, even though the defendant did not know that police would interrogate him about a separate crime).

5. *Id.* at 576-77 (alterations in original) (quoting *Moran v. Burbine*, 475 U.S. 412, 422 (1986)).

‘[W]e have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights.’ Here, the additional information could affect only the wisdom of a *Miranda* waiver, not its essentially voluntary and knowing nature.⁶

If one’s starting point is that merely upon arrest and interrogations, the parties have not become adversarial and the only reason that counsel is brought in at all is to protect the privilege against self-incrimination, there is some force to the *Spring* analysis.⁷ But, when the parties do become adversarial, the right to counsel kicks in for its own sake and not merely to prevent self-incrimination.⁸ At that point, the defendant is entitled to “a flow of information to help him calibrate his self-interest.”⁹ Indeed, that is what lawyers do, and it is why we have the right to counsel. So, one would think that the *Spring* language would not be valid once the Sixth Amendment right to counsel has attached.

The point at which the Sixth Amendment becomes relevant is not in dispute. Any onset of formal proceedings can trigger the right.¹⁰ This includes, but is not limited to, indictment,¹¹ arraignment,¹² and preliminary hearing.¹³ In some jurisdictions, it includes obtaining an arrest warrant, but that is not the federal rule.¹⁴ So, does the Sixth Amendment create a more serious right to counsel role than the Fifth Amendment? Surprisingly, with one exception, the Court has said, “No.”¹⁵

II. WHAT DOES THE RIGHT TO COUNSEL ENTAIL?

The one exception is that under the Sixth Amendment, the police may not surreptitiously seek to obtain a confession.¹⁶ That is, even without custodial interrogation, the police are not free to attempt to deliberately elicit a confession by use of real or pretend friends.¹⁷ If they do that, the confession will be

6. *Id.* (alteration in original) (citation omitted) (quoting *Moran*, 475 U.S. at 422).

7. *See id.* at 572-75. As I have argued elsewhere, “[W]hen a police officer grabs a suspect by the scruff of the neck, handcuffs him, and hauls him down to the police station, it is nonsense to pretend that this is nonadversarial . . .” Loewy, *supra* note 1, at 436.

8. *See* Loewy, *supra* note 1, at 437.

9. *Id.* at 428.

10. *Kirby v. Illinois*, 406 U.S. 682, 689 (1972).

11. *Massiah v. United States*, 377 U.S. 201, 205 (1964).

12. *Brewer v. Williams*, 430 U.S. 387, 398 (1977).

13. *Michigan v. Jackson*, 475 U.S. 625, 630 (1986), *overruled by* *Montejo v. Louisiana*, 556 U.S. 778 (2009).

14. *See, e.g.,* *People v. Samuels*, 400 N.E.2d 1344, 1344 (N.Y. 1980) (holding that the defendant’s right to counsel commenced when the felony complaint was filed and the arrest warrant was issued).

15. *See Patterson v. Illinois*, 487 U.S. 285, 297 (1988).

16. *See Maine v. Moulton*, 474 U.S. 159, 179-80 (1985).

17. *See id.* at 177-78.

inadmissible,¹⁸ even though prior to the onset of adversary proceedings, confessions obtained in such a manner are non-problematic,¹⁹ unless obtained involuntarily.²⁰

The Court has, however, said that *Miranda* warnings, presumably with all of the *Spring* baggage, are sufficient to warn an indicted defendant of his right to counsel. I will now examine how that came to be. In *Patterson v. Illinois*, the defendant made two arguments that *Miranda* warnings were inadequate.²¹ First, he argued that once the adversary posture of the parties had hardened by an indictment, the police were not free to approach the defendant to obtain additional information.²² Second, the defendant argued that even if he could be approached, the Sixth Amendment required warnings much stronger than *Miranda*.²³ The Court rejected both arguments.²⁴

In regard to the first question, by a 5-4 vote, the Court equated the Sixth Amendment right to counsel, which the defendant clearly had, with the Fifth Amendment right to counsel, which an unindicted arrestee, subject to custodial interrogation, had.²⁵ Absent from the Court's analysis was any mention of the fact that *Miranda* warnings are not intended to suggest the wisdom of a waiver of the right to counsel.²⁶

In assessing the normative desirability of the Court's equation of the two rights to counsel, it is helpful to go back to the reasons for allowing questioning of suspects in the first place. Justice Jackson once famously suggested that prior to charging a defendant with a crime, society needs the opportunity to question suspects so that it can determine who is worth pursuing and who is not.²⁷ Of course, the corollary to that is once the government thinks that it knows who committed the crime and has enough evidence to charge him, questioning is unnecessary.²⁸

Indeed, the Court has never explained why there is a societal need to seek self-incriminating information from those against whom it already believes the prosecution has enough evidence to prosecute. To be sure, such evidence might make the prosecutor's case easier, but that is not the way the system is supposed to work. Indeed, at that point, there is no chance that anything the defendant says can help him be released.²⁹ Consequently, as a matter of

18. *Id.* at 180.

19. *Illinois v. Perkins*, 496 U.S. 292, 294 (1990).

20. *See, e.g., Arizona v. Fulminante*, 499 U.S. 279, 302 (1991).

21. *See Patterson v. Illinois*, 487 U.S. 285, 290 (1988).

22. *Id.*

23. *Id.* at 292.

24. *Id.* at 293.

25. *Id.* at 297.

26. *See id.* at 291. The Court does allow for the possibility that its calculus might be different if the defendant had already obtained counsel or had counsel appointed. *See Craig Bradley, What's Left of Massiah?*, 45 TEX. TECH L. REV. 247, 252 (2013); *supra* notes 3, 13 and accompanying text.

27. *See Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring).

28. *See Spano v. New York*, 360 U.S. 315, 327 (1959) (Stewart, J., concurring).

29. *Cf. Duckworth v. Eagan*, 492 U.S. 195, 217 (1989) (quoting *Dickerson v. State*, 276 N.E.2d 845,

wisdom, there is no value to the indicted defendant (former suspect) in talking to the police.

So, the question is whether in the Sixth Amendment context, wisdom should be relevant. It seems fairly clear to me that the answer to that unasked question is “yes.” While the Fifth Amendment may only be concerned with voluntariness (after all, that is what the Fifth Amendment is about), the adversary process, which includes the right to counsel, is about making the wisest possible decisions. It may not be the duty of the prosecutor or the police to “supply a suspect with a flow of information to help him calibrate his self-interest,” but that is precisely the duty of a lawyer once the adversary process has commenced.³⁰ And, that is, or should be, the difference between the Fifth and Sixth Amendment rights to counsel.

That brings me to Patterson’s second point, namely, the adequacy of *Miranda* warnings.³¹ Unfortunately, counsel for Patterson gave the Court little reason to require a beefed-up warning.³² In response to a question, counsel, most likely because of nervousness rather than incompetence, suggested that if the warnings had said “counsel who would act on your behalf and represent you” as opposed to just “counsel,” the warnings would have been adequate.³³ Understandably, the Court was unpersuaded.³⁴

On the other hand, if the defendant had argued that the warnings must say something like this,

Mr. Patterson: You have been indicted for murder. You have the right to remain silent. Anything that you say can and will be used against you in a court of law. To help you decide whether to exercise this right or any other right you may have, you are entitled to be represented by a lawyer. If you cannot afford a lawyer, one will be appointed for you before any questioning. In deciding whether to invoke your right to a lawyer, you should be aware that there are a whole series of choices that you may be asked to make between now and the time you go to trial. You should also be aware that it is my job to try to persuade you to give up your rights. Your lawyer will be on your side and can help you decide when it is in your best interest to talk and when it is in your best interest to remain silent.³⁵

852 (Ind. 1972), *overruled by* *Luna v. State*, 788 N.E.2d 832, 834-35 (Ind. 2003)) (discussing the value of a person being able to clear his name and get home for dinner).

30. *Colorado v. Spring*, 479 U.S. 564, 576 (1987) (quoting *Moran v. Burbine*, 475 U.S. 412, 422 (1986)).

31. *See Patterson*, 487 U.S. at 292.

32. *See id.* at 294-95.

33. *Id.* at 294 n.7 (quoting Transcript of Oral Argument at 7-8, *Patterson*, 487 U.S. 285 (No. 68-7059)) (internal quotation marks omitted).

34. *See id.*

35. Similar warnings were given at trial in *Faretta v. California*, 422 U.S. 806 (1975), a case holding that an adequately warned defendant has a right to self-representation. *See especially supra* notes 8-9 and accompanying text.

Candidly, for reasons that I will get to later, I do not believe that the Court would have required such an instruction.³⁶ But, at least the issue would have been joined.

Perhaps the Court's most shocking disregard of Sixth Amendment rights was the Court's very brief and overly simplistic opinion in *Kansas v. Ventris*, in which the Court allowed an uncounseled statement to impeach the credibility of the defendant.³⁷ What was striking about *Ventris* was that the violation of the right was real and not even arguably, merely prophylactic.³⁸ Specifically, an informant-cellmate of Ventris who was asked by the police to report any incriminating statements deliberately elicited a confession.³⁹ At Ventris's trial, Ventris denied his liability.⁴⁰ This denial was impeached by the statements that the government informant had deliberately elicited from Ventris while in jail.⁴¹

So, this seems like an easy case. The statement was obtained in violation of the defendant's right to counsel. Therefore, because it was a real constitutional right, the statement could not be used for any purpose. Thus, Ventris wins. Unfortunately, easy as that sounds, the Court did not hold that way. Instead, the Court held that (1) the violation occurred at the time the confession was obtained; (2) the question was how much evidence should be excluded by the exclusionary rule; and (3) the answer to that question was that the prosecutor should not be allowed to make use of Ventris's confession in its case-in-chief, but the confession could be used to impeach the defendant's credibility.

This analysis is normatively wrong on so many levels that it is hard to know where to begin. For starters, the Court is simply wrong in saying that the right was violated at the time the statement was obtained. Let us test that. Suppose the police had obtained the statement against Ventris but had elected not to use it at trial. Suppose further that Ventris had been acquitted and later learned that the police had obtained his statement. Finally, assume that upon learning of this, Ventris had sued the police for violating his Sixth Amendment rights. If the Court was correct in its holding that the violation occurred when the confession was obtained rather than when it was used, one would think that

36. See discussion *infra* Part III.

37. See *Kansas v. Ventris*, 556 U.S. 586, 594 (2009).

38. See *id.* at 590. The Court never tires of reminding us of the prophylactic character of *Miranda*. Although the Sixth Amendment also has (or more accurately, had) prophylactic rights, surreptitiously eliciting a confession without any warnings is not one of them. Compare *Michigan v. Harvey*, 494 U.S. 344, 346 (1990) (holding that a statement taken in violation of the prophylactic rule may be used to impeach a defendant's false statement but not for use as substantive evidence), with *Montejo v. Louisiana*, 556 U.S. 778, 797 (2009) (holding that the police may reinitiate an interrogation after a defendant has asserted his Sixth Amendment right to counsel).

39. *Ventris*, 556 U.S. at 589. While one could argue that the confession was not deliberately elicited but simply reported by an uninvited ear, the Kansas Supreme Court rejected that possibility and the State did not cross-appeal. See *id.*

40. *Id.* at 588.

41. See *id.*

Ventris's suit would be successful. But, so far as I know, nobody thinks any such thing.⁴²

One reason that analysis fails is that if the statement were not used, obtaining the statement would not have been a critical stage of the proceedings, and consequently, the right to counsel would not have applied in the first place.⁴³ Rather, it is only because the evidence was used that the right to counsel even applied.

Beyond that, the cases could hardly be clearer in establishing that the right to counsel is violated by the introduction of the statement at trial and not the obtaining of the statement. Two cases have specifically considered the question: *Massiah v. United States* and *Maine v. Moulton*.⁴⁴ Justice Scalia, for the Court in *Ventris*, misstated *Massiah* and ignored the even clearer case of *Moulton*.

Here is how the *Ventris* opinion described *Massiah*:

Our opinion in *Massiah*, to be sure, was equivocal on what precisely constituted the violation. It quoted various authorities indicating that the violation occurred at the moment of the postindictment interrogation because such questioning "contravenes the basic dictates of fairness in the conduct of criminal causes." But the opinion later suggested that the violation occurred only when the improperly obtained evidence was "used against [the defendant] at his trial." That question was irrelevant to the decision in *Massiah* in any event. Now that we are confronted with the question, we conclude that the *Massiah* right is a right to be free of uncounseled interrogation, and is infringed at the time of the interrogation. That, we think, is when the "Assistance of Counsel" is denied.⁴⁵

But, what *Massiah* said was quite different. *Massiah* conceded that the act of obtaining the statements may have been justified because the police were investigating other crimes.⁴⁶ Nevertheless, the Court concluded, "All that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution against *him* at his trial."⁴⁷

This statement suggests that not only was the violation the use, rather than the obtaining of the evidence, but that the answer to that question was highly relevant to the resolution of the case. Indeed, the *Massiah* Court went out of its

42. Cf. *Weatherford v. Bursey*, 429 U.S. 545, 560-61 (1977) (holding that the government's spying on a defendant's conversations with his attorney was not necessarily a violation of the Sixth Amendment if the government chose not to make use of any of the information so obtained).

43. See, e.g., *United States v. Wade*, 388 U.S. 218, 222-23 (1967).

44. See *Maine v. Moulton*, 474 U.S. 159, 161 (1985); *Massiah v. United States*, 377 U.S. 201, 201-02 (1964).

45. *Ventris*, 556 U.S. at 591-92 (alteration in original) (citations omitted) (quoting *People v. Waterman*, 175 N.E.2d 445, 448 (1961)) (internal quotation marks omitted).

46. See *Massiah*, 377 U.S. at 206.

47. *Id.* at 207.

way to emphasize that the obtaining of the evidence may not have even been a violation of the Constitution.

Any doubt on that score was clearly erased by *Maine v. Moulton*, in which the Court split 5-4 on the question of whether evidence obtained in the absence of counsel was admissible when the police had good reason to monitor conversations between the defendant and his co-defendant, the informant, including the defendant's threat to kill the State's witness.⁴⁸ Because of these reasons, it was clear that simply listening to the conversations did not violate the defendant's right to counsel.⁴⁹ But, introducing the statements so obtained did.⁵⁰

The issue was clearly joined. The four Justice dissent, authored by Chief Justice Burger, Justice Scalia's predecessor on the bench, argued that if there was no underlying violation, it made no sense to exclude the statements.⁵¹ The majority, however, differed, recognizing that the use of the statements at trial were forbidden, even if obtaining the statements did not violate the Sixth Amendment.⁵²

Well, how did the *Ventris* Court deal with a decision so clearly against it? It did the only thing it could; it ignored it. If the Court truly thought that *Massiah* and *Moulton* were wrong, it could have overruled them. While I think it would have been wrong normatively to overrule those decisions, the Court frequently decides things in ways that do not please law professors. But happily, the Court does not frequently grossly misapply or ignore relevant precedent. Ironically, not a single Justice on the Court challenged Justice Scalia on this point.⁵³

The remaining case reducing the significance of the right to counsel is *Montejo v. Louisiana*.⁵⁴ *Montejo* overruled the earlier case of *Michigan v. Jackson* and held that neither the request for counsel at a preliminary hearing nor the actual appointment of counsel at the preliminary hearing was sufficient to preclude the State from questioning the defendant, so long as he was re-Mirandized.⁵⁵ Given the Court's parsimonious view of the right to counsel as expressed in *Patterson*, the decision was not surprising. And, to the Court's

48. See *Moulton*, 474 U.S. at 161, 180-81.

49. See *id.* at 179-80.

50. *Id.*

51. See *id.* at 181-82 (Burger, J., dissenting).

52. See *id.* at 179 (majority opinion); Arnold H. Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907, 930 (1987).

53. See *Kansas v. Ventris*, 556 U.S. 586, 594-98 (2009) (Stevens, J., dissenting). Justice Stevens, joined by Justice Ginsburg, did dissent but on the ground that the exclusionary rule should apply to the pretrial violation rather than the inherent wrong being the use of the evidence. See *id.* at 594-95. So, I concur with Professor Mosteller's conclusion that the Court has not followed *Massiah*. See Robert P. Mosteller, *The Sixth Amendment Rights to Fairness: The Touchstones of Effectiveness and Pragmatism*, 45 TEX. TECH L. REV. 1, 23 (2013).

54. See *Montejo v. Louisiana*, 556 U.S. 778, 780 (2009).

55. *Id.* at 794-95.

credit, it at least overruled the case law contrary to its position as opposed to ignoring it or misstating it, as it had done in *Ventris*.⁵⁶

III. WHY WON'T THE COURT TAKE THE PRETRIAL RIGHT TO COUNSEL SERIOUSLY?

Although there are undoubtedly complex reasons and sub-reasons that explain the Court's pretrial Sixth Amendment jurisprudence, I believe the overarching one is Justice Scalia's observation, which I believe a majority of the Court shares, "[T]he ready ability to obtain uncoerced confessions is not an evil but an unmitigated good Admissions of guilt resulting from valid *Miranda* waivers 'are more than merely "desirable"; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law."⁵⁷

I have argued elsewhere that this statement is surely overstated even in regard to *Miranda* violations.⁵⁸ When the adversary process has begun, however, it is positively false. Yet, belief in that statement probably has caused the Court to undervalue the role counsel can play pretrial.

In *Patterson*, the Court claimed that it could find no additional value that a lawyer could serve after the onset of adversary proceedings rather than before.⁵⁹ But, this ignores both that the State's need for a confession is less and that the defendant's need for protection is more after indictment. When it is no longer an unsolved crime, an unwise and un-counseled confession is not an unmitigated good. The harm to the State in not getting a confession is significantly diminished because it now has enough evidence to proceed with the case. On the other hand, the harm to the defendant is exponentially greater in that there is no longer any value to his talking to the police because the police are now powerless to drop the charges.

Additionally, it seems absurd to say, as *Patterson* does, that a defendant's lawyer has no more of a role than a suspect's lawyer. The whole theory of the onset of the adversary process counsels in the other direction. So, when the Court said, "we do not discern a substantial difference between the usefulness of a lawyer to a suspect during custodial interrogation, and his value to an accused at postindictment questioning," the Court simply ignored the historical distinction between the two situations.⁶⁰

56. See *id.* at 794.

57. *McNeil v. Wisconsin*, 501 U.S. 171, 181 (1991) (citation omitted) (quoting *Moran v. Burbine*, 475 U.S. 412, 426 (1986)).

58. See Loewy, *supra* note 1, at 432, 434 (arguing that false voluntary confessions cause much more harm than good). Also, many confessions obtained consistent with *Miranda* involve a great deal of coercion and, while perhaps tolerable on balance, are not "an unmitigated good." See *id.* at 434.

59. See *Patterson v. Illinois*, 487 U.S. 285, 298-99 (1988).

60. *Id.* at 299.

IV. CONCLUSION

So, it appears that the Court's failure to take the pretrial right to counsel seriously is predicated on two premises: (1) that as a matter of policy, "voluntary" confessions are an unmitigated good and (2) that counsel can do no more for an indicted defendant than a mere arrestee.⁶¹ Even in the face of the argument that counsel's job is rendered virtually impossible if a post-indictment confession is obtained in the absence of counsel, the *Ventris* Court per Justice Scalia opined, with some satisfaction I might add, "In such circumstances the accused continues to enjoy the assistance of counsel; the assistance is simply not worth much."⁶²

There is some irony that Justice Scalia, as the author of the *Ventris* and *Montejo* opinions, as well as the unmitigated good characterizations of voluntary confessions, has led the Court into taking policy, albeit bad policy, seriously. Historically, Justice Scalia has sought to distinguish his jurisprudence as one in which policy considerations are irrelevant.⁶³ Yet, he seems quite willing, arguably eager, to use his conception of policy to lead the Court away from the plain meaning of the "right to counsel" clause of the Sixth Amendment in the service of maximizing admissible confessions.⁶⁴

It is my fondest hope that some day in the future, the Court will allow the policy of the Sixth Amendment to trump the policy of voluntary confessions at any cost. Unfortunately, that day is not likely to come anytime soon.

61. See discussion *supra* Part III.

62. *Kansas v. Ventris*, 556 U.S. 586, 592 (2009).

63. See Arnold H. Loewy, *A Tale of Two Justices (Scalia and Breyer)*, 43 TEX. TECH L. REV. 1203, 1204 (2011).

64. See discussion *supra* Parts II-III.